No. 01–488

Supreme Court, U.S.
FILED
NOV 5 2001
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY STUART RING,
PETITIONER,

-VS-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

JANET NAPOLITANO
ATTORNEY GENERAL

KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION

ROBERT L. ELLMAN
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR RESPONDENT

CAPITAL CASE
QUESTION PRESENTED FOR REVIEW

Should this Court overrule *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), in which this Court held that Arizona's capital sentencing statute (providing for judge-sentencing) is constitutional?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASON FOR DENYING THE WRIT

ARIZONA'S CAPITAL SENTENCING STATUTE IS CONSISTENT WITH THE SIXTH AMENDMENT AND THIS COURT'S DECISIONS IN *WALTON V. ARIZONA*, *APPRENDI V. NEW JERSEY*, AND *JONES V. UNITED STATES*. 6

CONCLUSION 17

APPENDIX A A-1

TABLE OF AUTHORITIES

CASES PAGE

Almendarez-Torres v. United States,
523 U.S. 224, 118 S. Ct. 1219 (1998) 11

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348 (2000) 6-11, 15-17

Buchanan v. Angelone, 522 U.S. 269, 118 S. Ct. 757 (1998) 14

Jones v. United States,
526 U.S. 227, 119 S. Ct. 1215 (1999) 6, 7,11

Loving v. United States, 517 U.S. 748, 116 S. Ct. 1737 (1996) .. 13

Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546 (1988) 14

Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976) 13

State v. Harrod, __ Ariz. __, 26 P.3d 492 (2001) 8

State v. Perez Lara, 170 Ariz. 203, 823 P.2d 70 (App. 1990) 8

State v. Ring, __ Ariz. __, 25 P.2d 1139 (2001) .. 1, 2, 5-7, 9, 11, 12

State v. Wagner, 194 Ariz. 310, 982 P.2d 270 (1999) 11

State v. West, 176 Ariz. 432, 862 P.2d 192 (1993) 12, 14

United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) 13

Walton v. Arizona,
497 U.S. 639, 110 S. Ct. 3047 (1990) 6-12, 14-16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 3, 11, 13, 14, 16

U.S. Const. amend. VIII 3, 13-17

U.S. Const. amend. XIV, § 1 3

U.S. Const. art. III, § 2 2

STATUTES

28 U.S.C. § 1254(1) 2

A.R.S. § 13–702(B) 3, 12

A.R.S. § 13–703 3

A.R.S. § 13–703(A) 9

A.R.S. § 13–703(B) 6

A.R.S. § 13–703(F) 14

A.R.S. § 13–1105 ..... 3, 9
A.R.S. § 13–1105(C) 9

OPINION BELOW

Petitioner is a death-row inmate who seeks review of the Arizona Supreme Court's affirmance of his death sentence, as published in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001).

STATEMENT OF JURISDICTION

Petitioner requests this Court to review the decision of the Arizona Supreme Court in *State v. Ring*. The Arizona Supreme Court issued its decision on June 20, 2001. Petitioner timely filed the petition for writ of certiorari on or about September 18, 2001. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2, and 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . .

Arizona Revised Statutes §§ 13–703, 13–1105, and 13–702(B) are reproduced in Appendix A.

STATEMENT OF THE CASE

Petitioner and accomplices James "Yoda" Greenham and William Ferguson murdered John Magoch, an armored truck driver, in November, 1994. Petitioner killed Magoch by shooting him in the head from a distance, using a rifle. The murder occurred while the armored vehicle was parked in front of a department store. Petitioner fired the shot as the victim sat in the driver's seat, waiting for his co-worker to return with a pick up from the department store. The murderers absconded with the armored vehicle, followed by Petitioner's pickup truck. The conspirators abandoned the armored vehicle in a church parking lot later in the day, after removing checks, coins, and nearly $563,000 in United States currency. They left the victim's body in the vehicle.

Petitioner had worked as a part-time driver for the Loomis Armored Car Company in 1988 and 1989; he was a championship caliber marksman; he had known Ferguson, a former Phoenix Police Officer, since 1989. He met Greenham in 1993, when both men were working as corrections officers in the Arizona State Prison system.

The jury convicted Petitioner of first-degree murder, conspiracy to commit armed robbery, armed robbery, first-degree burglary, and theft.

At the pre-sentence hearing, Greenham testified to the details of the crime, and stated that Petitioner was the leader who set forth the tactics they would employ. After killing John Magoch and absconding with the armored vehicle, the three accomplices stopped at the church parking lot and transferred the money into Petitioner's truck. They divided the cash the day after the murder, with Ferguson taking his own share and Petitioner holding his own and Greenham's shares in Petitioner's duffel bag. Greenham would go to Petitioner's house whenever he needed money. Greenham also testified that no one was involved in the robbery other than he, Petitioner, and Ferguson.

The trial court sentenced Petitioner to death on the first-degree murder conviction after finding two aggravating circumstances: (1)

pecuniary gain; and (2) the offense was committed in an especially heinous or depraved manner. The trial court found, as a non-statutory mitigating circumstance, Petitioner's "minimal criminal record," but concluded that it was not sufficiently substantial to call for leniency. The trial court imposed prison sentences on the other convictions.

Petitioner appealed to the Arizona Supreme Court. He argued among other things that Arizona's capital sentencing statute violated the Sixth Amendment. Specifically, Petitioner asserted that he had the right to have a jury (1) make factual findings on aggravating and mitigating evidence, and (2) determine whether to impose death or life imprisonment based on those findings. On June 20, 2001, the Arizona Supreme Court affirmed Petitioner's convictions and sentences, specifically rejecting Petitioner's Sixth Amendment argument. *State v. Ring*, 200 Ariz. 267, ¶¶ 40–44, 65, 25 P.3d 1139 (2001). The Supreme Court struck the aggravating factor of heinous or depraved and affirmed the death sentence after independently re-weighing the remaining aggravating circumstance of pecuniary gain against the minimal mitigation: "This murder was not the result of sudden impulse or loss of control nor a robbery gone bad, but a planned, ruthless robbery and killing." *Id.* at ¶ 63. Petitioner now seeks review of that ruling in his Petition for a Writ of Certiorari, docketed in this Court on September 20 as Case No. 01–488.

REASON FOR DENYING THE WRIT

ARIZONA'S CAPITAL SENTENCING STATUTE IS CONSISTENT WITH THE SIXTH AMENDMENT AND THIS COURT'S DECISIONS IN *WALTON V. ARIZONA*, *APPRENDI V. NEW JERSEY*, AND *JONES V. UNITED STATES*.

I. This Court Has Already Determined that It Need Not Revisit *Walton* Based on Apprendi or *Jones*.

There is no compelling reason to grant a writ of certiorari in this case. No conflict exists between the Arizona Supreme Court's decision and the decision of another state court of last resort. No conflict exists between the Arizona Supreme Court's decision and any decision of a United States court of appeals. The Arizona Supreme Court did not decide an unsettled question of federal law. To the contrary, the Arizona Supreme Court determined in Petitioner's case that it was bound by this Court's pronouncements on this issue, and that it was constrained under the supremacy clause from adopting Petitioner's position because to do so would conflict with this Court's decisions. *State v. Ring*, 200 Ariz. 267 at ¶ 44, 25 P.3d 1139.

In *Walton v. Arizona*, 497 U.S. 639, 647–48, 110 S. Ct. 3047 (1990), this Court upheld Arizona's capital sentencing scheme, which provides that the trial court, rather than the jury, determines whether a sentence of death is appropriate, based upon a consideration of aggravating and mitigating factors as determined by the court in the sentencing proceedings. *See* A.R.S. § 13–703(B). This Court has expressly stated that *Jones* and *Apprendi* have not overruled *Walton*. Contrary to Petitioner's contention, the Court's recent decisions in *Apprendi* and *Jones* do not suggest that the *Walton* decision should be reexamined.

In deciding *Apprendi v. New Jersey*, 530 U.S. 466, 496–97, 120 S. Ct. 2348, 2366 (2000), and *Jones v. United States*, 526 U.S. 227, 250–51, 119 S. Ct. 1215, 1227–28 (1999), this Court anticipated the issue Petitioner is presenting and ruled on it. Indeed, a minority of

justices dissented from the ruling on this issue in both cases. *Apprendi*, 530 U.S. at 536–38, 120 S. Ct. at 2387–88; *Jones*, 526 U.S. at 271–72, 119 S. Ct. at 1238. The Arizona Supreme Court unanimously recognizes its duty to follow the majority opinions in *Jones* and *Apprendi*. *Ring*, 200 Ariz. 267, at ¶¶ 40–44, 25 P.3d 1139. Petitioner demonstrates that disagreement exists among jurists on this issue. But the existence of disagreement does *not* mean the issue is unsettled. Petitioner is merely adopting and re-urging the dissent's position in *Apprendi*.

In *Jones*, this Court interpreted the federal car jacking statute:

> This case turns on whether the federal car-jacking statute, 18 U.S.C. § 2119, as it was when petitioner was charged, defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.

Jones, 526 U.S. at 230, 119 S. Ct. at 1217. The majority ultimately resolved that question in favor of finding three separate offenses. *Id.* However, *Jones* did not overrule *Walton*. Justice Souter, writing for the majority, said:

> It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution.

526 U.S. at 248, 119 S. Ct. at 1226. Indeed, Justice Souter expressly distinguished *Walton*:

> There [in *Walton*], the Court described statutory specifications of aggravating circumstances in capital sentencing as "standards to guide the . . . choice between the alternative verdicts of death and life imprisonment. . . ." The Court thus characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a

> greater and lesser penalty, not as a process of raising the ceiling of the sentencing range available. . . .

Id. at 251, 119 S. Ct. at 1228.

Likewise, the Court's decision in *Apprendi* expressly reaffirms *Walton*:

> Finally, *this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges*, after a jury verdict holding a defendant guilty of a capital crime, *to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona*, 497 U.S. 639, 647–649 (1990).

530 U.S. at 496, 120 S. Ct. at 2366 (emphasis added). Thus, there is no unsettled question.

II. Petitioner's Argument Rests on the Erroneous Premise that the Death Sentence is Beyond the Prescribed Maximum Penalty in the Range of Sentencing.

Apprendi does not apply to a court's determination of aggravating circumstances. Petitioner fails to recognize the distinction between sentence enhancement and aggravation under Arizona law, and that failure undermines his argument. Stated simply, enhancement raises the permissible range of punishment, while aggravation elevates a sentence within the previously defined range. *State v. Perez Lara*, 170 Ariz. 203, 206 at n. 2, 823 P.2d 70, 73 (App. 1990).

Unlike the situation in *Apprendi*, the trial court's finding of aggravating circumstances does not increase the "statutory maximum" sentence under Arizona's capital sentencing scheme. First degree murder is a capital offense under Arizona law. *State v. Harrod*, 200 Ariz. 309, ¶ 43, 26 P.3d 492 (2001). Consequently, as this Court stated in *Apprendi*, Petitioner "is *charged* with actions that expose him to the

death penalty," and his right to a jury trial extends to "all the elements of the charge." 530 U.S. at 497, 120 S. Ct. at 2366 (emphasis supplied). The guilty verdict exposed Petitioner to a death sentence because the statutory range of sentences for first-degree murder is "death or life imprisonment." A.R.S. § 13–1105(C); *see also* A.R.S. § 13–703(A) ("A person guilty of first degree murder as defined in section 13–1105 shall suffer death or imprisonment in the custody of the state department of corrections for life ... If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life."). Death is thus the "prescribed statutory maximum" sentence for this offense, and a death sentence does not extend the range of sentencing. *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2363.

Petitioner miscasts the question as "whether the Sixth Amendment right to a jury determination of facts that increase the available range of punishment for criminal defendants subject to a term of imprisonment applies as well to defendants subject to the penalty of death." Petition at 2 (emphasis omitted). The undisputed answer to that question is yes, as *Apprendi* makes clear. The underlying problem is that Petitioner's question presumes that a death sentence is *beyond* Arizona's prescribed maximum statutory penalty for first degree murder, when in fact it *is* the prescribed maximum penalty. That is a point upon which the majority and minority differed in *Apprendi*. Petitioner has reached the end of the road: he cannot overcome *Walton*, *Apprendi*, and the plain language of the Arizona capital sentencing statutes.

Petitioner, however, does not stop driving where the road ends. He tries to convince this Court that the Arizona statutes do not *really* mean what they say—that "[f]irst degree murder is punishable by death or life imprisonment as provided by section 13–703," and that a death sentence exceeds the statutory range of punishment. Toward that end, Petitioner takes the Arizona Supreme Court's agreement with the *dissent* in *Apprendi* and treats it as an "authoritative" change in the law that renders *Walton*'s construction "mistaken." The legislature did not amend the Arizona capital sentencing statute. The *State v. Ring*

majority does nothing more than endorse and restate the dissent's position in *Apprendi*. Justice O'Connor's dissent in *Apprendi* states:

> A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.

530 U.S. at 538, 120 S.Ct. at 2388. The majority opinion of the Arizona Supreme Court stated in Petitioner's appeal that "the present case is precisely as described in Justice O'Connor's dissent - Defendant's death sentence required the judge's factual findings." 200 Ariz. 267, at ¶ 43, 25 P.3d 1139. The court employed Justice O'Connor's framework in characterizing the "range of punishment," stating:

> In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release.

Id. at ¶ 42. The Arizona Supreme Court's discussion of *Apprendi* does not call into question this Court's interpretation of Arizona law in *Walton*. Nor does that discussion create a basis for finding that *Apprendi* has overruled *Walton*:

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The

> person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

Apprendi, 530 U.S. at 497, 120 S. Ct. at 2366 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257, n. 2, 118 S. Ct. 1219 (1998) (Scalia, J., dissenting)).

The Arizona Supreme Court's alternative understanding of the "range of sentencing" has no Sixth Amendment consequences, as that court implicitly conceded by affirming Petitioner's sentence. *Ring*, 200 Ariz. 267, at ¶ 44, 25 P.3d 1139. The Arizona statute upheld in *Walton* remains materially unchanged, and so has this Court's determination of what a "range of sentencing" means for Sixth Amendment purposes:

> the finding of aggravating facts falling within the traditional scope of capital sentencing [is] a choice between a greater and a lesser penalty, not ... a process of raising the ceiling of the sentencing range available.

Jones, 526 U.S. at 251, 119 S. Ct. at 1228 (characterizing the holding in *Walton*).

The Arizona Supreme Court's use of the term "sentencing range" in deciding Petitioner's appeal created a semantic distinction, not a legal one. That becomes obvious in light of that court's recent rejection of a vagueness challenge to the capital sentencing statute:

> Arizona's statute ... [A.R.S. § 13–703(A)] states with clarity that *the punishment for committing first degree murder is either death, natural life, or life in prison with the possibility of parole*. Thus, a person of ordinary intelligence can easily determine the *range of punishment* he or she faces for committing first degree murder.

State v. Wagner, 194 Ariz. 310, 313, 982 P.2d 270, 273 (1999) (emphasis supplied). The Arizona Supreme Court has also implicitly

recognized that statutory aggravating and mitigating factors do not extend the sentencing range in capital cases:

> Defendant ... argues that the equal protection clause also demands that a jury make the determination [whether aggravating factors exist], because in Arizona certain noncapital defendants are entitled to a jury determination of sentence enhancement factors. *See* A.R.S. § 13–604(K). Notwithstanding the fact that *sentence enhancement and aggravation are different*, compare A.R.S. § 13–604(K) with A.R.S. §§ 13–702, 13–703, this precise argument has also been rejected by the Ninth Circuit Court of Appeals.

State v. West, 176 Ariz. 432, 454, 862 P.2d 192, 214 (1993) (Citations omitted). Thus, Petitioner errs in concluding that Arizona law changed in the appeal of his case, and that *Walton* now "rests on a mistaken construction of Arizona law."

Petitioner also fails to appreciate the broader consequences of treating the sentencing range as the array of sentences a court can impose "solely on the basis of the jury's verdict." *See Ring*, 200 Ariz. 267, at ¶ 42, 25 P.3d 1139. Under current Arizona law in non-capital cases, judges would lose the discretion to aggravate or mitigate a sentence, because only a presumptive sentence would be lawful based on the verdict alone. A.R.S. § 13–702(B). The legislature would have to make radical changes to capital and non-capital sentencing statutes alike, displacing sentencing hearings with second trials where juries consider all of the aggravation and mitigation evidence. That scenario does not comport with this Court's past pronouncements on the subject of judicial sentencing, or with sentencing in federal criminal cases under the Federal Sentencing Guidelines:

> As now-Justice Breyer noted, the Guidelines evince a compromise between a pure "charge offense" system in which sentences are determined based solely upon conduct of which a defendant is convicted, and a "real offense" system, in which sentences are fashioned in view of all relevant mitigating and

> aggravating factors surrounding the defendant's conduct. A sentencing court may, therefore, consider relevant conduct of the defendant for purposes of making Guidelines determinations, even if he has not been charged with--and indeed, even if he has been acquitted of--that conduct, so long as the conduct can be proved by a preponderance of the evidence.

United States v. Lombard, 72 F.3d 170, 176 (1st Cir. 1995) (internal citations omitted). It also loses sight of the need for consistency, particularly in capital cases:

> [J]udicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt v. Florida, 428 U.S. 242, 252, 96 S. Ct. 2960, 2967 (1976) (plurality opinion).

III. Petitioner Fails to Distinguish the Eighth Amendment Requirement of Finding Aggravating Factors from the Sixth Amendment Requirement that a Jury Find the Defendant Guilty of a Capital Offense.

Aside from the fact that death *is* the statutory prescribed maximum sentence for first-degree murder under Arizona law, it is the *Eighth*—rather than the *Sixth*—Amendment that requires a finding of one or more statutory aggravating circumstances in order to impose the death sentence. *Loving v. United States*, 517 U.S. 748, 755, 116 S. Ct. 1737, 1742 (1996) (Eighth Amendment requires capital sentencing scheme to genuinely narrow class of persons eligible for death penalty and reasonably justify imposition of more severe sentence on defendant compared to others found guilty of murder; can be accomplished by requiring sentencer to find at least one aggravating factor).

There is a significant difference between *Sixth* Amendment eligibility for a sentencing range that *includes* death, and *Eighth* Amendment eligibility for the death penalty. Sixth Amendment eligibility requires only that a defendant be convicted of first-degree murder. Eighth Amendment eligibility requires the finding of an aggravating circumstance under A.R.S. § 13-703(F). Like most states, Arizona narrows the class of death-eligible killers during the penalty phase by requiring the sentencer (trial judge) to find one or more statutory aggravating circumstance. *West*, 176 Ariz. at 449, 862 P.2d at 209; *see also Buchanan v. Angelone*, 522 U.S. 269, 118 S. Ct. 757 (1998) (narrowing function performed during eligibility phase of capital sentencing proceeding "often through consideration of aggravating circumstances"); *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546 (1988) (most states perform narrowing function by requiring the finding of at least one aggravating circumstance). Indeed, in *Walton* the Court expressly noted that aggravating circumstances are not "elements of the offense," but are determinations that distinguish killers suitable for execution under the Eighth Amendment:

> Walton also suggests that in Florida aggravating factors are only sentencing "considerations", while in Arizona they are "elements of the offense." But as we observed in *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct 1749, 90 L.Ed.2d 123 (1986), an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)." *Id.* at 156, 106 S. Ct., at 1755 (citation omitted).

497 U.S. at 648, 110 S. Ct. at 3054.

In his concurring opinion in *Apprendi*, Justice Thomas espoused the view that the majority in *Apprendi* did not go far enough. Under the rule Justice Thomas proposed, joined by Justice Scalia, *any* sentence enhancement factor (even if the enhancement did not exceed the statutory maximum set by the legislature) would have to be found by a jury. 530 U.S. at 499-523, 120 S. Ct. at 2367–80 (Thomas, J., concurring). However, Justice Thomas noted that even the "broader rule" he espoused would likely have no effect on the Court's holding in *Walton*, or capital sentencing schemes in general:

> Finally, I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton v. Arizona*, 497 U.S. 639, 647–649, 110 S. Ct. 3047, 111 L.Ed.8d 511 (1990). See *ante*, at 2365–2366. *Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for *in the area of capital punishment unlike any other area*, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, *neither Arizona nor any other jurisdiction could provide—as, previously, it freely could and did—that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment.* Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.

Id. at 522–23, 120 S. Ct. at 2380 (emphasis added, footnote omitted).

Petitioner's reliance upon Justice O'Connor's dissenting opinion in *Apprendi* is misplaced in this regard. This Court has repeatedly stated that the *Eighth* Amendment requirements determining death eligibility

do not implicate the *Sixth* Amendment. Again, in *Walton* the Court noted the distinction:

> Our holding in *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L.Ed.2d 704 (1986), provides further support for our conclusion. *Cabana* held that an appellate court could constitutionally make the *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982), finding—that the defendant killed, attempted to kill, or intended to kill—in the first instance. We noted that "*Enmund*, 'does not affect the state's definition of any substantive offense, even a capital offense.'" 474 U.S., at 385, 106 S. Ct., at 696 (citations omitted), and that "while the *Eighth Amendment* prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." *Id.*, at 385, n. 3, 106 S. Ct., at 385, n. 3. *Enmund* only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." 474 U.S. at 386, 106 S. Ct., at 697. *If the Constitution does not require that the Enmund finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.*

497 U.S. at 648–49, 110 S. Ct. at 3054–55 (emphasis added).

Justice O'Connor wrote in her *Apprendi* dissent that, under Arizona law, "If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment." 530 U.S. at 537, 120 S. Ct. at 2387. That is true, for *Eighth* Amendment purposes, but it is irrelevant for *Sixth* Amendment purposes. The distinction is crucial and dispositive. Because under Arizona law "death" *is* the "statutory maximum" sentence for first-degree murder, and because the trial court's findings of aggravating circumstances determine death eligibility under the

Eighth Amendment, the rationale of *Apprendi* is inapplicable to Arizona's capital sentencing scheme.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

JANET NAPOLITANO
Attorney General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

ROBERT L. ELLMAN
Assistant Attorney General
(Counsel of Record)

Attorneys for RESPONDENT

CRM97–1517
108361

APPENDIX A

A.R.S. § 13–703 (1993)
(in effect at Petitioner's sentencing by the trial court)

A. A person guilty of first degree murder as defined in § 13–1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13–1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for

the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13–1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was

under fifteen years of age or was seventy years of age or older.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13–303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

H. As used in this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:

1. First degree murder.

2. Second degree murder.

3. Manslaughter.

4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.

5. Sexual assault.

6. Any dangerous crime against children.

7. Arson of an occupied structure.

8. Robbery.

9. Burglary in the first degree.

10. Kidnapping.

11. Sexual conduct with a minor under fifteen years of age.

A.R.S. § 13–1105 (1994)
(in effect when Petitioner murdered John Magoch)

A. A person commits first degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under § 13–1405, sexual assault under § 13–1406, molestation of a child under § 13–1410, marijuana offenses under § 13–3405, subsection A, paragraph 4, dangerous drug offenses under § 13–3407, subsection A, paragraph 7, narcotics offenses under § 13–3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under § 13–3409, kidnapping under § 13–1304, burglary under § 13–1506, 13–1507 or 13–1508, arson under § 13–1703 or 13–1704, robbery under § 13–1902, 13–1903 or 13–1904, escape under § 13–2503 or 13–2504, child abuse under § 13–3623, subsection B, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under § 28–622.01 and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13–703.

A.R.S. § 13–702(B) (2000)

The upper or lower term imposed pursuant to Sec. 13–604, 13–604.01, 13–604.02, 13–702.01 or 13–710 or subsection A of this section may be imposed only if the circumstances alleged to be in aggravation or mitigation of the crime are found to be true by the trial judge upon any evidence or information introduced or submitted to the court prior to sentencing or any evidence previously heard by the judge at the trial, and

factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.